No

I

Supreme Court

OCTOBER

—

THE AMERICAN T

JOHN PA

—

On Writ of Certiorari to th
for the

—

REPLY BRIEF FOR
CONFECTIONERY A
INTERNATIONAL UN

—

LAURENCE GOLD
AFL-CIO
815 - 16th Street, N.W.
Washington, D.C. 20006

Attorneys for

WILSON - EPES PRINTING CO., INC.

TAB

ARGUMENT .....

I. RESPONDENT E
UTORY INTERP

II. RESPONDENTS'
FOR SEEKING A

III. THE PATTERSO
TIONS OF INTE

CONCLUSION .....

TA

Cases:

Aetna Casualty
Bivens v. Six
U.S. 388 .....
California Bre
598 .....
EEOC v. E.I. I
223 (D. Del.
Griggs v. Duke
Teamsters v. U
Youakim v. Mil

Statutes:

Civil Rights A
§ 2000e.
Section 703
Section 703
Section 703

Miscellaneous:

Aaron, Reflecti
forceability
Rev. 1532 (1
Congressional F
Slichter, Healy
tive Bargaini
U.S. Departmen
tive Bargaini

Supreme

THE A

On Writ of Cert

REPLY BI
CONFECTI
INTERNAT

I. RESPONI
TORY IN

Respondent I
low cannot be
unceremoniously
contrived dicho
mentation of *b*
tion 703(h) sta
ployment pract
compensation, o
of employment
. . . provided th
an intention to
those words we
iority systems
fective date of

by the words of § 703(h), Congress intended that a union and an employer may be found to violate Title VII by *adopting* without "an intention to discriminate" a "bona fide seniority system" whose every "appl[ication]" is protected by § 703(h). As we show below, the EEOC's interpretation of § 703(h) flies in the face of the language of that provision and would undermine a major purpose Congress meant that provision to serve.

The proper reading of § 703(h) is that the provision delineates the class of systems whose operation Congress wished to protect—"bona fide seniority systems" that are not the product of "an intention to discriminate." The critical point is the Congressional decision to protect that class of seniority systems, but not others. The EEOC's reading of § 703(h) would make it illegal to adopt, and in reality to apply, seniority systems that fall precisely within that protected class, and thus would thwart the Congressional design.

For all practical purposes, in the context of a Title VII challenge to a seniority system there is no way to separate adoption of a system from application of the system. The illusory nature of the EEOC's distinction between "application" and "adoption" is apparent when one considers the putative basis for a challenge to the *adoption* of a system and what might be the remedy for such a challenge. The *adoption* of a system in and of itself could have no adverse impact upon anyone; only its admittedly lawful *application* could have such an impact. Thus, under the EEOC's theory, the *adoption* of a seniority system could be a violation only if its *application* would result in an " 'artificial, arbitrary and unnecessary barrier[] to employment * * * which operates to exclude [blacks and] cannot be shown to be related to job performance.' " EEOC Br. 29 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431). And, the remedy for the "adoption" violation EEOC would create, to be meaningful, would necessarily include an injunction against *application* of the system

(and presumably backpay for any black employees adversely affected by *application* of the system). If the remedy did not forbid the *application* of the system (and compensate the victims of such *application*), it would be meaningless. Yet, if the remedy did forbid the *application* of a bona fide seniority system adopted without an intention to discriminate, it would be forbidding precisely what the EEOC concedes Congress meant to protect—precisely what § 703(h) tells employers and unions they may lawfully do.

There is not a word in the legislative history to suggest that Congress meant to distinguish between adoption and application of a bona fide seniority system. Bereft of such support, the EEOC puts forward its reading of § 703(h) as a *post hoc* means to "reconcile[]" § 703(h) "with the central purposes of Title VII . . . while not enforcing the court of appeals' more far-reaching . . ." interpretation of Title VII. EEOC Br. 18. The EEOC's hypothesis is that "no purpose of Section 703(h) would be served—and the central purpose of Title VII would be disserved—by" the interpretation of § 703(h) submitted by the petitioners. *Ibid.* But the EEOC's own reasoning negates that hypothesis.

The EEOC fashions its interpretation of § 703(h) as if the only Congressional consideration underlying that provision were the protection of employee seniority expectations. Once having arrived at its interpretation, however, the EEOC then acknowledges that there was at least one other Congressional interest in enacting § 703(h). In the EEOC's words,

> [T]he seniority principle . . . is of "overriding importance" in collective bargaining and in the organization of the workplace. . . . In considering Title VII and Section 703(h), Congress recognized that unions almost universally use seniority to allocate scarce benefits among their members. . . . The seniority principle is thus often vital to a union's efforts to aggregate and reconcile the conflicting in-

terests of those it represents . . . a central aspect
a union's role under the federal labor laws.

Accordingly, Congress may well have believed th
to require a union to show that seniority serves
business necessity would undermine one of the ce
tral institutions of collective bargaining. Speci
cally, the business necessity requirement is not w
suited to justifying the use of the seniority princi
itself—that is, length of service—as a criterion. .
The principal justification for using seniority as
criterion lies in tradition, and in employees' gene
willingness to accept it as a fair basis for allocati
scarce benefits. [EEOC Br. 30-31.]

But that Congressional interest in the "seniority pri
ciple" is not served by the EEOC's interpretation
§ 703(h). For the EEOC's interpretation would ma
the *adoption* of bona fide seniority systems fashioned
serve precisely the purposes listed in the quoted passa
unlawful unless the proponents of the system could s
isfy the "business necessity requirement"—a result
rectly contrary to what the EEOC acknowledges was t
Congressional intent.

Apparently aware of this defect in its argument, t
EEOC turns to the particular system at issue here a
claims that this system, albeit by hypothesis bona fi
does not implicate the Congressional purpose in prote
ing the operation of the "seniority principle . . . in c
lective bargaining and in the organization of the wor
place." Thus, the EEOC states:

This case, however, does not concern a union's r
in reconciling employees' conflicting interests
using a measure that is generally accepted as legi
mate; nor does it involve dispensing preferent
treatment "on the basis of * * * time served
employment," *California Brewers Association*
Bryant, *supra*, 444 U.S. at 606. The lines of p
gression are a constraint that was imposed on
use of seniority in order to serve management
jectives. [EEOC Br. 31.]

As we show in the margin, the EEOC is
both in its assertion that § 703(h) is directed o
union and employee interests and in its ass
that the part of the system here at issue is necessari
product solely of "management objectives."[1] And, e
fatal to its analysis, the EEOC has offered an inter
tion of § 703(h) that would apply generally an
offered a justification of that interpretation that do
fit the general situation but only what EEOC w
perceives to be the particular facts of this case.[2]

---

[1] Earlier in its brief, the EEOC makes a point of the fa
"[b]y its terms Section 703(h) applies only to employers,
unions." EEOC Br. 21 n. 22. In fact, it is not uncommon f
ployers to establish seniority systems in non-union plants. S
EEOC v. E. I. DuPont de Nemours, 445 F. Supp. 223, 2
(D. Del. 1978) (rejecting claim that § 703(h) does not appl
employer's unilaterally adopted seniority system). A bo
employer seniority system is plainly covered by the te
§ 703(h). Moreover, as we have shown in text, *supra* at p.
EEOC concedes that Congress believed "the seniority princi
is of 'overriding importance' in collective bargaining . . . .
this Court has recognized that seniority systems emerge fro
give and take of free collective bargaining," "reflecting as t
. . . the specific characteristics of a particular business or ind
California Brewers, 444 U.S. at 608. For purposes of § 703
is immaterial which party to collective bargaining was the
force behind a particular aspect of a seniority system. *Ibi*
also, n.2, *infra*.

Nor should it be assumed that narrowness in a seniority
invariably reflects only the employer's desires. As stated
treatise recognized by this Court to be definitive (Slichter
at 140, cited *infra* at 9), the "formulation of [seniority
themselves requires the compromise of a great variety of c
tive interests among union members." See also, Aaron, *Ref*
on the Legal Nature and Enforceability of Seniority Rig
Harv. L. Rev. 1532, 1535 (1962).

[2] EEOC's analysis logically suggests not the construct
§ 703(h) it urges (under which application of *all* bona fide
is protected, but adoption of such systems is not protected);
the EEOC's analysis suggests a construction under whic
adoption and application of employee-favored systems a
tected, but neither adoption nor application of systems tha

Thus, the EEOC is, by its own analysis, incor
initial statement that "no purpose of Sectio
would be served" by the interpretation of § 7
fered by petitioners. See *supra* p. 3. The otl
ise of the EEOC's hypothesis—that "the centra
of Title VII would be disserved" by petitioners'
tation of § 703(h)—is equally wrong.

The EEOC states that "Congress enacte
703(h) not to 'narrow [the] application of *
[T]itle [VII]' or undermine its basic objec
only to 'clarif[y] its * * * intent and eff
Cong. Rec. 12723 (1964) (remarks of Sen. H
. . . ." EEOC Br. 18 (brackets in original). T
apparently takes Senator Humphrey's statement
that Title VII, in §§ 703(a) and (c), was mean
the addition of § 703(h) to outlaw innocently
seniority systems that perpetuate the effects o
discrimination—unless justified by business n
and thus that § 703(h) should be read as na
possible to minimize the interference with the
of §§ 703(a) and (c). But Senator Humphre
ment cuts in quite a different direction. If § 70
not meant to "narrow [the] application" of §§ 7
(c), and if § 703(h) requires proof of a discr
intent before a seniority system can be successf
lenged, then it follows that §§ 703(a) and
not intended in the first place to outlaw seniorit
that are not motivated by an intent to discrimi
EEOC "implicitly acknowledges" as much wher

---

only management's objectives is protected. For if the
correct that § 703(h) was not meant to protect a *bona fi*
system serving only management's objectives, it would
§ 703(h) protects neither the adoption nor the applicatio
system. The result would be to add the following unwr
tion to § 703(h)'s assurance that "an employer" may d
between employees based on a "bona fide seniority syste
where the employer has established the system to serve h
poses." Presumably, that exception would be applicable
merit systems and incentive systems, which are linked
ity systems in the language of § 703(h).

that "statements of House proponents of Titl
its effects on seniority, and statements made
proponents before § 703(h) was proposed, are
the meaning of § 703(h)." EEOC Br. 23 n.
Union Br. 26-27. Thus, the "central purpos
VII *never* included the invalidation of inno
vated seniority systems, and § 703(h) should
an artificially narrow construction in deferen
Congress never shared.

II. RESPONDENTS' ALTERNATIVE GRO SEEKING AFFIRMANCE

1. The Patterson respondents proffer as
tive basis for affirmance that the "line of p
policy does not constitute a component of a
system" entitled to the protection of § 703(h)
tual predicate for their argument is stated
(Pat. Br. 21):

> When a vacancy occurs in one of the
> a line of progression, only employees wh
> a lower job in that line are eligible to
> vacancy. (App. 21-22). Among the el
> ders, promotion is not determined by eith
> in the lower job or seniority in the line
> sion; rather, branch seniority controls.

For the latter proposition, respondents do n
finding made by the lower courts. Rather, th
that counsel for petitioners admitted in their
with the courts of appeals that plant seniorit
within the lines of progression (Pat. Br. 21-
However, as respondents are obliged to a
counsel for petitioners *later* advised the court
that their earlier statements were factually
and that upon checking further they had disc

---

[3] In this Company each plant is referred to as a "
court of appeals used the term "branch seniority,"
district court used the term "plant seniority." The t
synonymous.

"for promotion to a permanent vacan
level within most lines of progressio
the immediately proceeding job is cor
23, n. 25). Respondents *concede* that
later reported by counsel to the cour
lines of progression utilizing job seni
"seniority system" within the meanin
Br. 100-102).

The court below refused to addres
tention on this confused state of the
ing that the earlier representations
tioners furnished "considerable sup
ents' assertion that plant seniority
ment within the lines of progression
court continued:

> This was not, however, a factua
> gated in the case and the recor
> posed is ambiguous on it. In view
> for deciding that 703(h) has no
> iority systems instituted after t
> Title VII, we need not address
> alternative basis for decision. [

In light of the court of appeals'
factual issue constituting the essenti
spondents' alternative argument was
gated in the case," respondents are
serting their alternative claim in this
tiffs, it was their burden to make a
cient to enable decision of the legal
vance; they having failed to do so,
not presented. And even if that failu
how excused, the court of appeals'
that the record is "ambiguous" with
essential to the claim would in any
particularly appropriate case for
the Court's usual policy not to resolv
upon by the court [below] nor a
here," *Aetna Casualty Co. v. Flowers*

See also, *Bivens v. Six Unknown Na*
U.S. 388, 397-398; *Youakim v. Miller*

2. We do not mean by the forego
if the facts were as respondents p
progression would be unprotected by
contrary, against the remote chance th
opt to reach this issue despite the
which it is presented, we proceed to
advancement within the lines of pro
trolled by plant seniority § 703(h)
plicable.

In *California Brewers Ass'n v. Br*
this Court explained that § 703(h) pro

> more than simply those componen
> seniority scheme that, viewed i
> or effectuate the principle that le
> will be rewarded. In order for a
> to operate at all, it has to cont
> that accomplish certain necessa
> which may not themselves be
> length of employment.[16]

---

[16] See generally S. Slichter, J. Healy
Impact of Collective Bargaining on
(1960). [444 U.S. at 606-607].

At the referenced pages in the semin
the authors explain that there are tw
of every seniority system—the *measu*
the unit or "scope of application" of
definition of the employees who will
pete for a particular opportunity):

> A distinction should be made
> of seniority or its scope of a
> measurement of, or ranking b
> For example, the phrase "depa
> could have one or both of two
> mean that the least senior wor
> department will be the first laid
> the department might be based o

the company. In this sens
seniority" refers to the u
ing seniority. Or the term
ment of seniority; that is
department will have their
by their length of servi
could mean both if the m
unit of application.

The scope of the senior
ment of service vary acc
the seniority criterion is
competitive job rights ar
be one scope-measuremen
layoffs, another for perm
promotions, and still othe
treatments to be accorde
lustrate, a broad unit is
of layoffs, thus enhancin
man to be retained durin
ment. In the case of pr
more likely to govern. [S

Respondents concede—and t
that § 703(h) protects a dec
union to limit the unit of co
opportunity to those employe
progression or to those holding
100-102). See *Teamsters v. U*
355, n. 41:

> [In 1964], as now, seni
> number of ways, includi
> employer, in a particula
> in a job, or in a line of p
> tive history contains no
> system was preferred.

See also, *California Brewers*, 4
tion, a system under which
"length of time . . . in a job"
tion to those who have held th
which seniority is measured b
line of progression" limits the
who have worked in that line o

Respondents, contend, how
having chosen to confine the
tain jobs to those who have
the protection of § 703(h) b
in the plant, rather than le
as the *measure* of service
Teamsters provides the comp
tion: as among the possibl
history contains no suggesti
preferred", 431 U.S. at 355, n.

Respondents argue that if
ure of competition, limiting e
incumbent on particular jobs
requirement that is external
as would limiting eligibility
degree. (Pat. Br. 106-107). B
ment is really with the mea
collective bargaining, and not
may compete. The definition
here is precisely the same as
system, which, as we have dis
edge is protected by § 703(h
the unit of competition as oc
creates the same "eligibility
seniority system respondents

Moreover, in *California B*
an argument analytically ind
respondents. In that case, the
the "unit of competition" as
who were classified as "perm
industry service as the measu
The Court ruled that the fa
measure of competition that w
competition did not deprive t
of § 703(h). 444 U.S. at 609.

Respondents contend finally
unit of competition more na

seniority "depart[s]
cepted concepts of 'sen
contention is refuted b
authoritative Labor D
gaining provisions.[4]

In sum, respondent
side the protection of
struction given that s
Brewers.[5]

---

[4] See U.S. Dept. of Lab
Provisions-Seniority (194
system "seniority applied
of total plant or company
point with approval to th

> trend . . . toward the
> date of hire in the
> units of seniority app
> by date of original
> prevalent.

Slichter *et al.*, *supra*, 117

[5] Respondents' proffere
consequences that Congre
For under respondents' in
tems—those that have th
of past assignment discri
§ 703(h), while broader
vance more rapidly to the
under the system that res
—that in which advancem
ceding job—a black emp
Title VII to a different pa
a transfer to the lowest
transferring would be las
in ability to progress to
disability would be encou
sion. This reality, includ
ployees' willingness to t
supra, at 117-118. By c
progression is on the ba
upon securing a transfer
able to compete for prom

III. THE PATTERSO
OF INTENTIONA

The arguments in th
ents respecting the lan
are adequately address
respondents devote th
lengthy but wholly irr
tional discrimination i
well as in the plants
present posture of this
assumed to be *bona fi*
of statutory interpret
bona fide seniority sy
date of Title VII. Res
tentional discriminatio
terpretation of § 703(
have a full opportunity
that the lines of prog
company-wide transfer

---

would not automatically b
indeed might well be first-

[7] EEOC contends that t
fide. EEOC Br. 35. The *en*
there no findings of fact b
clusion, but that it is dou
support the requisite findin
as to the *bona fides* of ot
already been ordered by the
finding should be done in t

The decisi

LAURENCE GOL
AFL-CIO
815 - 16th Stre
Washington, D